IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.1267/2001
Reserved on.17.5.2007
Decided on.14.6.2007

B.R. Verma **…Petitioner.**

Versus

Food Corporation of India and another. **…Respondents**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*.yes.*

For the petitioner : **Mr. Shrawan Dogra, Advocate**

For the respondents **Mr. H.K. Bhardwaj, Advocate.**

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the disciplinary proceedings were initiated against the petitioner vide memorandum dated 19.2.2001. The gist of the charge levelled against him was that he was responsible for issuing wheat stored at Kangra Depot which was of non-issuable quality which has allegedly tarnished the image of the Corporation. He filed a short reply to the memorandum. The disciplinary authority had appointed one Sh. Ishwari Prashad, Manager (Inquiry) as Inquiry Officer on 16.3.2001. The Inquiry Officer had fixed 27.3.2001 as the date of the commencement of the inquiry. The petitioner had attended the proceedings on 27.3.2001 and thereafter the next date given by the Inquiry Officer was April 9, 2001, on which date he was required to give the list of defence documents to be relied upon and the

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? Yes.

name of the Defence Assistant to defend him. A new Inquiry Officer Sh. A.C. Saluja was appointed vide order dated 23.3.2001 in place of Sh. Ishwari Prashad. He fell ill on 11th April, 2001 and the Medical Officer advised him different tests and also rest for ten days on 11.4.2001. The tests as advised by the doctor were conducted on 12.4.2001. He received notice dated 3.4.2001 on 16.4.2001 wherein the new Inquiry officer had fixed April 12th and 13th, 2001 as the dates for hearing. He represented to the new Inquiry Officer to postpone the hearing fixed for 17.4.2001 and fixed another date taking in view his ill health. He had also made a representation to the authorities to permit him to visit Shimla. The matter was in between adjourned from 17.4.2001 to 23.4.2001. He remained as an indoor patient with effect from 22.4.2001 to 26.4.2001. He was admitted to Mahindra Hospital, Green Park, New Delhi where he was kept in the ICU. He had made a representation to the new Inquiry officer Sh. A.C. Saluja that in view of his ill health he would not be able to attend the hearing fixed for 23.4.2001. The Inquiry Officer had abruptly returned the inquiry file to the disciplinary authority showing his inability to complete the inquiry proceedings before 30.4.2001. He received order dated 30.4.2001 whereby penalty of reduction in rank by one stage was imposed upon him for the alleged misconduct for which inquiry was incomplete. He had to retire on the same day i.e. 30th April, 2001. He filed the statutory appeal against the imposition of penalty vide order dated 30.4.2001 on 13.6.2001. The appellate authority had rejected the appeal without a speaking order on 20.8.2001, the copy of which was received by him on 19.11.2001.

Mr. Shrawan Dogra, Advocate appearing on behalf of the petitioner had strenuously argued that there was no occasion for the respondents to initiate the disciplinary proceedings against the petitioner in view of Annexure P-5 and P-6 whereby the food was found suitable for distribution

under the public distribution system. Mr. Dogra had further submitted that once the inquiry had been initiated, the same could not have been dropped abruptly resulting in imposition of penalty of reduction in rank by one stage by invoking Regulation 63 of the Food Corporation of India (Staff) Regulations, 1971. He had also contended that the imposition of penalty of reduction in rank by one stage was disproportionate to the alleged misconduct and the entire exercise undertaken by the respondents by initiating the disciplinary proceedings thereafter abruptly dropping the same and then invoking the Regulation 63 of the Food Corporation of India (Staff), 1971 is bad with factually as well as legal malafide.

Mr. H.K. Bhardwaj, Advocate appearing on behalf of the respondent-corporation had supported the order of imposition of penalty dated 30.4.2001 as well as the appellate order dated 20.8.2001. He had also contended that the inquiry was to be dropped due to non-cooperative attitude of the petitioner.

I have heard the parties and perused the record.

Before the rival submissions made by the parties are considered it would be apt to note a few important Regulations framed under section 45 of the Food Corporation Act, 1964 with the previous sanction of the Central Government called the “Food Corporation of India (Staff) Regulations, 1971 (hereinafter called as the Regulations). Section 4 of the Regulations deals with the conduct Regulations. Section 5 deals with the discipline and appeal Regulations. Regulation 54 provides for penalties. The following are the major penalties which can be imposed upon the employees of the Corporation:

(i) **“reduction to a lower stage in the time-scale of pay for a specified period, with further directions as to whether or**

not the employee of the Corporation will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay;

(ii) Reduction to a lower time-scale of pay or post which shall ordinarily be a bar to the promotion of the employee to the time-scale of pay or post from which he was reduced, with or without further directions regarding conditions of restoration to the post from which the employee of the Corporation was reduced and his seniority and pay on such restoration to the post;

(iii) Compulsory retirement;

(iv) Removal from service which shall not be a disqualification for future employment under Corporation;

(v) Dismissal from service which shall ordinarily be a disqualification for future employment under the Corporation."

Regulation 57 provides that the Board or the authority may institute disciplinary proceedings against an employee of the Corporation and direct a disciplinary authority to institute proceedings against any employee of the Corporation on whom that disciplinary authority is competent to impose under these Regulations any of the penalties specified in Regulation 54. The detailed procedure for imposition of major penalty is provided under Regulation 58. Regulation 59 deals with action on the inquiry report. Regulation 63 deals with special procedure in certain cases and the same is reproduced as under:

"Notwithstanding anything contained in Regulation 58 to Regulation 62:

(i) where any penalty is imposed on an employee on the ground of conduct which has led to his conviction on a criminal charge, or

(ii) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these regulations.

(iii) Where the Board is satisfied that in the interest of security of the State, it is not expedient to hold any inquiry in the manner provided in these regulations,

the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit."

The combined reading of the Regulations suggests that a detailed procedure has been prescribed for imposition of minor as well as major penalties upon the employee of the Corporation.

In the present case the petitioner had been served with a charge-sheet to which he had filed a reply. The Inquiry Officer was appointed and thereafter a new Inquiry Officer was also appointed. He had attended the proceedings on 27.3.2001 as directed by the Inquiry Officer and had been seeking permission of the higher authorities to reach Shimla. He fell ill on 11th April, 2001 and the Medical Officer had advised him rest of ten days and also advised to undergo certain tests which he had undergone on 12.4.2001. He had made a request to the Inquiry Officer that he was not in a position to attend the proceedings on 12/13th April, 2001 and the same be adjourned. The proceedings were adjourned to 17.4.2001. Since the petitioner made a representation on 16.4.2001 to postpone the hearing from 17th April, 2001, the proceedings were postponed to

23.4.2001 but in the meantime the petitioner was admitted in Mahindera Hospital, New Delhi on 22.4.2001 where he remained as an indoor patient in ICU up to 26.4.2001. It was in these circumstances that the petitioner could not attend the proceedings. It is evident from the medical slips placed on record along with tests conducted upon the petitioner that he was not in a position to attend the proceedings being fixed frequently. The Inquiry Officer should have continued with the inquiry despite the petitioner's date of retirement i.e. 30th April, 2001. The procedure in the case was that the petitioner was to be suspended on 30th April, 2001 and thereafter proceedings could have been continued. There is no bar to continue the proceedings once initiated after serving memorandum upon the petitioner. Though Rule 9 of CCS (Pension) Rules, 1972 may not be *stricto sensu* applicable to the employees of the Corporation but the principles contained therein could be invoked by the respondent-corporation whereby it is stipulated that if the disciplinary proceedings are instituted while the Government servant is in service before his retirement shall after the retirement of the Government servant, be deemed to be proceedings under that rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.

The Supreme Court in **State of Punjab Vs. Khemi Ram**, 1969 (3) SCC 28 has held as under:

> **"There can be no doubt that if disciplinary action is sought to be taken against a Government servant it must be done before he retires as provided by the said rule. If a disciplinary enquiry cannot be concluded before the date of such retirement, the course open to the Government is to pass an order of**

suspension and refuse to permit the concerned public servant to retire and retain him in service till such enquiry is completed and a final order is passed therein. That such a course was adopted by the Punjab Government by passing the order of suspension on July 31, 1958 cannot be gainsaid."

The respondent-corporation instead of invoking Regulation 63 (ii) should have continued the disciplinary proceedings and if it was expedient could put the petitioner under suspension and concluded the inquiry. The petitioner had to retire on 30th April, 2001 and the disciplinary proceedings had been initiated by serving a memorandum on him on 19.2.2001. As per the charge-sheet the wheat was not fit for human consumption but it is evident from Annexures P-5 and P-6 that the same wheat has been made available to the Flour Mill after certifying its fitness by the High Power Committee constituted by the Corporation. In these circumstances even the disciplinary proceedings should not have been commenced against the petitioner who was on the verge of retirement.

The petitioner had an absolute right to defend himself as per the Regulations of the Board before the imposition of major penalty. The disciplinary proceedings initiated were dropped abruptly resulting in imposition of penalty of reduction in rank by one stage.

The question which requires the consideration of this Court is: Whether in the facts and circumstances mentioned hereinabove, the corporation could invoke sub Regulation (ii) of Regulation 63 of the Special Regulations of dispensing with the inquiry and impose major penalty upon the petitioner?

The reasons assigned for dispensing with the inquiry are reproduced as under:

"AND WHEREAS the preliminary hearing was held by Shri Ishwari Prasad on 27.3.2001 and subsequently the succeeding to Shri A C Saluja fixed the regular hearing on 12 and 13.4.2001. Although Shri b.R. Verma attended the preliminary hearing, he avoided regular hearing on 12.4.2001 by submitting a medical certificate dated 11.4.2001 from Dr. K. Tandon, Medical Officer, FCI, RO New Delhi. Dr. Tandon had advised rest to the CO for 10 days i.e. upto 20.4.2001. Shri Verma again avoided the inquiry refixed for 23.4.2001 by intimating the IO that he has been admitted in Mohindra Hospital Green Park New Delhi on 22.4.2001 and still under treatment. No medical certificate was, however, enclosed. Accordingly, the IO returned the charge memo and other connected papers vide his letter dated 23.4.2001 and reported that CO again failed to appear and instead sent a letter stating that he is admitted in a hospital in Green Park. All efforts for early completion of inquiry have thus been frustrated by the illness of the CO and there seems to be no possibility of completing the inquiry before the date of CO's retirement i.e. on 30.4.2001.

AND WHEREAS the undersigned has carefully perused the charge sheet issued to Shri Verma and the relevant record pertaining to its service and subsequent efforts to conduct an inquiry. There is no doubt that the CO has been consistently evasive and uncooperative in the matter of holding an enquiry. It is prima-facie unbelievable that the CO is inflicted with all manner of infirmities only at this stage when the enquiry against the charges had to be conducted in a time bound manner keeping in view the date of his retirement. The record clearly

indicates that efforts have been made to delay the entire process of enquiry by not accepting notices and thereafter taking the excuse of ill health. In the process, the CO had adopted dilatory tactics such as payment of advance TA and other irrelevant procedural formalities. In these circumstances when the CO is retiring at the end of this month and failure to proceed with the process of enquiry is only on account of the dilatory tactics adopted by him, the undersigned has no doubt that it is necessary and desirable to invoke the provisions of Regulation 63 in deciding this case.

AND WHEREAS on the merits of the matter, it is clear that this is a case of negligence and supervisory lapse on the part of the CO. The stocks in question were barely 500 tonnes or so and there appears to be no reason why these could not be kept free from infestation. Even if the cover fumigation was not initially feasible on account of over crowding, surely it was not impossible to decongest the godown and undertake the necessary operations so that the health of the stocks could be maintained. While this is foremost the responsibility of the officers on the spot, yet the supervisory lapse on the part of the Distt. Manager is quite clear and obvious. It is also not believable that the CO was unaware of the condition of the stocks. In that case, there was no occasion to issue the stocks for PDS. The fact that this has been done indicates carelessness and callousness on the part of the CO which has contributed to tarnishing the image of the Corporation and shaking the faith of the public in PDS. In these circumstances, it is difficult to take a lenient view of the matter and the

undersigned accordingly orders that Shri Verma be reduced in rank by one stage.

This court is of the firm opinion that the reasons assigned in order dated 30th April, 2001 for dispensing with the inquiry are neither cogent nor convincing. The petitioner had been making representations to the Inquiry Officer that he was not in a position to attend the proceedings due to his illness. He had remained in ICU from 22nd April, 2001 to 26th April, 2001. The necessary slips have been placed on record by the petitioner along with prescription. The petitioner had undergone the tests as advised by the doctor. The doctor had advised the petitioner rest for ten days. The petitioner had started participating in the proceedings but due to ill health was not in a position to continue the same. In these circumstances the disciplinary authority could not come to the conclusion that the petitioner was avoiding the inquiry by adopting dilatory tactics. The contents of order dated 30th April, 2001 definitely cast stigma upon the petitioner. The petitioner has been held negligent by the disciplinary authority without affording opportunity of being heard. Once the inquiry had been initiated the same should not have been dropped abruptly and thereafter invoke Regulation 63 of the Regulations.

It will be pertinent to reproduce sub Regulation (ii) of Regulation 63 which reads as under:

"where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these regulations."

It will also be apt to reproduce the language employed in Article 311 (2) proviso (b) of the Constitution of India as under:

"311 (2) (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonable practicable to hold such inquiry."

It is evident from the phraseology employed in Regulation 63 (ii) of the Regulations as well as Article 311 (2) proviso (b) of the Constitution of India that they are similar. True it is that Article 311 of the Constitution will not apply to the employees of the respondent-Corporation but the principles contained therein will apply to the employees of the respondent-corporation. The interpretation given by the Supreme Court to Article 311 (2) proviso (b) of the Constitution will be applicable to Regulation 63 (ii) of the Regulations as well. The Hon'ble Supreme Court has held in ***Union of India V. Tulsi Patel***, (1985) 3 SCC 398 as under:

"The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonable practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not 'impracticable'. According to the Oxford English Dictionary 'practicable' means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word 'practicable' inter alia as meaning "possible to practice or perform: capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word 'reasonably' as "in a reasonable manner: to a fairly sufficient extent". Thus,

whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonable practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or though others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of

Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311 (3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent Northern Railway, Varanasi. The Senior Commercial officer wrote a letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscip0line mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed on order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant

with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter.

The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311 (2). This is a constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following there upon would both be void and unconstitutional.

It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. The reason for dispensing with the inquiry need not, therefore, find a place in the final order. It would be usual to record the reason separately and then consider the question of the penalty to be imposed and pass the order imposing the penalty. It would, however, be better to record the reason in the final order in order to avoid the allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated. The reason for dispensing with the inquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of clause (b) of the second proviso. For instance, it would be no compliance with the requirement of clause (b) for the

disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any inquiry. Sometimes a situation may be such that it is not reasonably practicable to give detailed reasons for dispensing with the inquiry. This would not, however, per se invalidate the order. Each case must be judged on its own merits and in the light of its own facts and circumstances.

Where a government servant is dismissed, removed or reduced in rank by applying clause (b) or an analogous provision of the service rules and he approaches either the High Court under Article 226 or this Court under Article 32, the court will interfere on grounds well established in law for the exercise of power of judicial review in matters where administrative discretion is exercised. It will consider whether clause (b) or an analogous provision in the service rules was properly applied or not. The finality given by clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of malafides, if any made in the writ petition. In examining the relevancy of the reasons, the court will consieder4 the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated. In considering the relevancy of

the reasons given by the disciplinary authority the court will not, however, sit in judgment over them like a court of first appeal. In order to decide whether the reasons are germane to clause (b), the court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable way would have done. The matte will have to be judged in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a court room, removed in time from the situation in question. Where two views are possible, the court will decline to interfere."

The Supreme Court has held in ***Jaswant Singh V. State of Punjab*** (1991) 1 SCC 362 as under:

"The impugned order of April 7, 1981 itself contains the reasons for dispensing with the inquiry contemplated by Article 311 (2) of the Constitution. Paragraph 3 of the said order, which we have extracted earlier, gives two reasons in support of the satisfaction that it was not reasonably practicable to hold a departmental enquiry against the appellant. These are (i) the appellant has thrown threats that he with the help of other police employees will not allow holding of any departmental enquiry against him and (ii) he and his associates will not hesitate to cause physical injury to the witnesses as well as the enquiry officer. Now as stated earlier after the two revision applications were allowed on October 13, 1980, the appellant had rejoined services as Head Constable on March 5, 1981 but he was

immediately placed under suspension. Thereafter, two show cause notices dated April 4, 1981 were issued against him calling upon him to reply thereto within 10 days after the receipt thereof. Before the service of these notices the incident of alleged attempt to commit suicide took place on the morning of April 6, 1981 at about 11.00 a.m. In that incident the appellant sustained an injury on his right arm with a knife. He was, therefore, hospitalized and while he was in hospital the two show cause notices were served on him at about 10.00 p.m. on April 6, 1981. Before the appellant could reply to the said show cause notices respondent 3 passed the impugned order on the very next day i.e. April 7, 1981. Now the earlier departmental enquiries were duly conducted against the appellant and there is no allegation that the department had found any difficulty in examining witnesses in the said inquiries. After the revision applications were allowed the show cause notice was were issued and 10 days time was given to the appellant to put in his replies thereto. We, therefore, enquired from the learned counsel for the respondents to point out what impelled respondent 3 to take a decision that it was necessary to forthwith terminate the services of the appellant without holding an inquiry as required by Article 311 (2). The learned counsel for the respondents could only point out clause (iv) (a) of sub-para 29(A) of the counter which reads as under:

> **"The order dated April 7, 1981 was passed as the petitioner's activities were objectionable. He was instigating his fellow police officials to cause indiscipline, show insubordination and exhibit**

disloyalty, spreading discontentment and hatred, etc. and his retention in service was adjudged harmful."

This is no more than a mere reproduction of paragraph 3 of the impugned order. Our attention was not drawn to any material existing on the date of the impugned order in support of the allegation contained in paragraph 3 thereof that the appellant had thrown threats that he had his companions will not allow holding of any departmental enquiry against him and that they would not hesitate to cause physical injury to the witnesses as well as the enquiry officer if any such attempt was made. It was incumbent on the respondents to disclose to txhe court the material in existence at the date of the passing of the impugned order in support of the sunbjective satisfaction recorded by respondent 3 in the impugned order. Clause (b) of the second proviso to Article 311 (2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at page 270 of Tulsiram case: (SCC p. 504 para 130)

"A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the government servant is weak and must fail.

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the *ipse dixit* of the concerned authority. When the satisfaction of the concerned

authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer. In the counter filed by respondent No.3 it is contended that the appellant, instead of replying to the show cause notices, instigated his fellow police officials to disobey the superiors. It is also said that he threw threats to beat up the witnesses and the Inquiry Officer if any departmental inquiry was held against him. No particulars are given. Besides it is difficult to understand how he has given threats, etc. when he was in hospital. It is not shown on what material respondent 3 came to the conclusion that the appellant had thrown threats as alleged in paragraph 3 of the impugned order. On a close scrutiny of the impugned order it seems the satisfaction was based on the ground that he was instigating his colleagues and was holding meetings with other police officials with a view to spreading hatred and dissatisfaction towards his superiors. This allegation is based on his alleged activities at Jullundur on April 3, 1981 reported by SHO/GRP, Jullunder. That report is not forthcoming. It is no one's contention that the said SHO was threatened. Respondent 3's counter also does not reveal if he had verified the correctness of the information. To put it tersely the subjective satisfaction recorded in paragraph 3 of the impugned order is not fortified by any independent material to justify the dispensing with of the inquiry envisaged by Article 311 (2) of the Constitution. We are, therefore, of the opinion

that on this short ground alone the impugned order cannot be sustained."

The Apex Court has held in ***Chief Security Officer and others V. Singasan Rabi Das*** (1991) 1 SCC 729 as under:

"In our view it is not necessary to go into the submission made by Dr. Anand Prakash because we find that in this case the reason given for dispensing with the enquiry is totally irrelevant and totally insufficient in law. It is common ground that under Rules 44 to 46 of the said Rules the normal procedure for removal of an employee is that before any order for removal from service can be passed the employee concerned must be given notice and an enquiry must be held on charges supplied to the employees concerned. In the present case the only reason given for dispensing with that enquiry was that it was considered not feasible or desirable to procure witness of the security/other railway employees since this will expose these witnesses and make them ineffective in the future. It was stated further that if these witnesses were asked to appear at a confronted enquiry they were likely to suffer personal humiliation and insults and even their family members might become targets of acts of violence. In our view these reasons are totally insufficient in law. We fail to understand how if these witnesses appeared at a confronted enquiry, they are likely to suffer personal humiliation and insults. These are normal witnesses and they could not be said to be placed in any delicate or special position in which asking them to appear at a confronted enquiry would render

them subject to any danger to which witnesses are not normally subjected and hence these grounds constitute no justification for dispensing with the enquiry. There is total absence of sufficient material or good grounds for dispensing with the enquiry. In this view it is not necessary for us to consider whether any fresh opportunity was required to be given before imposing an order of punishment. In the result the appeal fails and is dismissed. There will be no order as to costs."

The Supreme Court has held in ***A.K. Kaul and another Vs. union of India and another*** 1995 (4) SCC 73 as under:

"Under clause (C) of the second proviso to Article 311 (2) the President or the Governor has to satisfy himself about the expediency in the interests of the security of the State to hold an enquiry as prescribed under Article 311 (2). Are the considerations involving the interests of the security of the State of such a nature as to exclude the satisfaction arrived at by the President or the Governor in respect of the matters from the field of justiciability? We do not think so. Article 19 (2) of the Constitution permits the State to impose, by law, reasonable restrictions in the interests of the security of the State on the exercise of the right to freedom of speech and expression conferred by sub-clause (a) of clause (1) of Article 19. the validity of the law imposing such restrictions under Article 19 (2) is open to judicial review on the ground that the restrictions are not reasonable or they are not in the interests of the security of the State. The Court is required to adjudicate

on the question whether a particular restriction on the right to freedom of speech and expression is reasonable in the interests of the security of the State and for that purpose the Court takes into consideration the interests of the security of the State and the need of the restrictions for protecting those interests. If the courts are competent to adjudicate on matters relating to the security of the State in respect of restrictions on the right to freedom of speech and expression under Article 19 (2) there appears to be no reason why the courts should not be competent to go into the question whether the satisfaction of the President or the governor for passing an order under Article 311 (2) (c) is based on considerations having a bearing on the interests of the security of the State. While examining the validity of a law imposing restrictions on the right to freedom of speech and expression this Court has emphasized the distinction between security of the State and maintenance of public order and has observed that only serious and aggravated forms of public order which are calculated to endanger the security of the State would fall within the ambit of clause (2) of Article 19. (See: Romesh Thappar v. State of Madras). So also in Tulsiram Patel the Court has pointed out the distinction between the expression "security of the State", "public order" and "law and order" and has stated that situations which affect public order are graver than those which affect law and order and situations which affect security of the State are graver than those which affect public order. The President or the Governor while exercising the power under Article 311 (2) (C) has to bear in mind this distinction

between situations which affect the security of the State and the situations which affect public order or law and order and for the purpose of arriving at his satisfaction for the purpose of passing an order under Article 311 (2) (C) the President or the Governor can take into consideration only those circumstances which have a bearing on the interests of the security of the State and not on situations having a bearing on law and order or public order. The satisfaction of the President or the Governor would be vitiated if it is based on circumstances having no bearing on the security of the State. If an order passed under Article 311 (2) (c) is assailed before a court of law on the ground that the satisfaction of the President or the Governor is not based on circumstances which have a bearing on the security of the State the Court can examine the circumstances on which the satisfaction of the President or the Governor is based and if it finds that the said circumstances have no bearing on the security of the State the Court can hold that the satisfaction of the President or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations.

We are, therefore, of the opinion that an order passed under clause (C) of the second proviso to Article 311 (2) is subject to judicial review and its validity can be examined by the court on the ground that the satisfaction of the President or the Governor is vitiated by malafides or its based on wholly extraneous or irrelevant grounds within the limits laid down in S.R. Bommai.

The Supreme Court has held in ***Union of India and another Vs. Balbir Singh and another,*** (1998) 5 SCC 216 as under:

If an order passed under Article 311 (2) proviso (c) is assailed before a court of law on the ground that the satisfaction of the President or the Governor is not based on circumstances which have a bearing on the security of the State, the court can examine the circumstances on which the satisfaction of the President or the Governor is based; and if it finds that the said circumstances have no bearing whatsoever on the security of the State, the court can hold that the satisfaction of the President or the Governor which is required for passing such an order has been vitiated by wholly extraneous or irrelevant considerations."

The Supreme Court has held in ***Ex.Constable Chhote Lal Vs. union of India and others,*** (2000) 10 SCC 196 as under:

> **"Mr. Yadav, learned counsel appearing for the appellant contends that though the employer has the power to dispense with an inquiry under Article 311 (2), second proviso, clause (b) of the Constitution but the conditions precedent for exercising that power have now been indicated in several decisions of this Court and in the present case, those conditions precedent cannot be said to have been satisfied. Mr. Choudhary, the learned Senior Counsel appearing for the respondents, on the other hand, contended that the appellant himself being a Police Constable could have influenced the witnesses who would have come in the department inquiry and if on that ground the departmental authorities apprehended that the inquiry would not be reasonable and fair, the conclusion cannot be interfered with.**

Having examined the rival contentions of the parties and bearing in mind the law laid down by this Court indicating the circumstances under which the inquiry under Article 311 (2), second proviso, clause (b) of the Constitution can be dispensed with and applying the same to the facts and circumstances and the reasons advanced by the authorities in arriving at the decision, we have no hesitation to come to the conclusion that the order dispensing with the departmental inquiry is not in accordance with law and necessarily the order of dismissal cannot be sustained. We accordingly set aside the order of dismissal passed against the appellant and permit the departmental authority to hold an inquiry if so desired, in accordance with law and come to the conclusion in the said proceeding.

Similarly, the Supreme ***Court in Sudesh Kumar V. State of Haryana and others,*** (2005) 11 SCC 525 as under:

"It is now an established principle of law that an inquiry under Article 311 (2) is a rule and dispensing with the inquiry is an exception. The authority dispensing with the inquiry under Article 311 (2) (b) must satisfy for reasons to be recorded that it is not reasonable practicable to hold an inquiry. A reading of the termination order by invoking Article 311 (2) (b), as extracted above, would clearly show that no reasons whatsoever have been assigned as to why it is not reasonable practicable to hold an inquiry. The reasons disclosed in the termination order are that the complainant refused to name the accused out of fear of harassment; the

complainant, being a foreign national, is likely to leave the country and once he left the country, it may not be reasonably practicable to bring him to the inquiry. This is no ground for dispensing with the inquiry. On the other hand, it is not disputed that, by order dated 23.12.1999, the visa of the complainant was extended up to 22.12.2000. Therefore, there was no difficulty in securing the presence of Mr. Kenichi Tanaka in the inquiry.

A reasonable opportunity of hearing enshrined in Article 311 (2) of the Constitution would include an opportunity to defend himself and establish his innocence by cross-examining the prosecution witnesses produced against him and by examining the defence witnesses in his favour, if any. This he can do only if inquiry is held where he has been informed of the charges levelled against him. In the instant case, the mandate of Article 311 (2) of the Constitution has been violated depriving reasonable opportunity of being heard to the appellant."

The appellate order also does not discuss the grounds mentioned in the appeal. It is settled law that the appellate authority has to look into and discuss the grounds mentioned in the appellate order in detail.

The Apex Court has held in ***Narinder Mohan Arya V. United India Insurance Co. Ltd. And others,*** 2006 (4) SCC 713 as under:

"We may for the aforementioned purpose take note of the extant rules operating in the field. Requirements of consideration in an appeal from an order of the disciplinary authority by the appellate authority is contained in Rule 37

whereas the provisions as regards filing of a memorial are contained in Rule 40 thereof, which read as under:

> ***"37. Consideration of Appeals*- (1) In case of an appeal against an order of suspension, the appellate authority shall consider whether in the light of the provisions of Rule 20 and having regard to the circumstances of the case the order of suspension is justified or not and confirm or revoke the order accordingly.**
>
> **(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 23, the appellate authority shall consider:**
>
> **(a) Whether the procedure prescribed in these Rules has been complied with and if not, whether such non-compliance has resulted in failure of justice;**
>
> **(b) Whether the findings are justified; and**
>
> **(c) Whether the penalty imposed is excessive, adequate or inadequate, and pass orders:**
>
> **I. setting aside, reducing, confirming or enhancing the penalty; or**
>
> **II. remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case.**

"40. *Memorial. -* An employee whose appeal under these Rules has been rejected by the Chairman/Chairman-cum-Managing Director or in whose case such appellate authority has enhanced the penalty either on appeal under Rule 24 or on review under Rule 39 (2) may address a memorial to the

Chairman/Chairman-cum-Managing Director in respect of that matter within a period of a 6 months from the date the appellant received a copy of the order of such appellate authority."

The appellate authority, therefore, while disposing of the appeal is required to apply its mind with regard to the factors enumerated in sub-rule 2 of Rule 37 of the Rules. The judgment of the civil court being inter parties was relevant. The conduct of the appellant as noticed by the civil court was also relevant. The fact that the respondent has accepted the said judgment and acted upon it would be a relevant fact. The authority considering the memorial could have justifiably came to a different conclusion having regard to the findings of the civil court. But, it did apply its mind. It could have for one reason or the other refused to take the subsequent event into consideration, but as he had a discretion in the matter, he was bound to consider the said question. He was required to show that he applied his mind to the relevant facts. He could not have without expressing his mind simply ignored the same.

An appellate order if it is in agreement with that of the disciplinary authority may not be a speaking order but the authority passing the same must show that there had been proper application of mind on his part as regard the compliance of the requirements of law while exercising his jurisdiction under Rule 37 of the Rules.

"The word "consider" in Rule 27(2) implies "due application of mind". It is clear upon the terms of Rule 27(2) that the Appellate Authority is required to consider (1) whether the procedure laid down in the Rules has been complied with; and if not, whether such non-compliance has resulted in violation of any provisions of the

Constitution or in failure of justice; (2) whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) whether the penalty imposed is adequate; and thereafter pass orders confirming, enhancing etc. the penalty, or may remit back the case to the authority which imposed the same. Rule 27(2) casts a duty on the Appellate Authority to consider the relevant factors set forth in clauses (a), (b) and (c) thereof.

There is no indication in the impugned order that the Director General was satisfied as to whether the procedure laid down in the Rules had been complied with; and if not, whether such non-compliance had resulted in violation of any of the provisions of the Constitution or in failure of justice. We regret to find that the Director General has also not given any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record. It seems that he only applied his mind to the requirement of clause (c) of Rule 27(2) viz. whether the penalty imposed was adequate or justified in the facts and circumstances of the present case. There being non-compliance with the requirements of Rule 27(2) of the Rules, the impugned order passed by the Director General is liable to be set aside."

The upshot of the above discussion is that the decision not to hold the inquiry against the petitioner on the ground that it was not practicable is not made out from the impugned order. As discussed herein above, the petitioner was always ready and willing to cooperative during the disciplinary proceedings, but it was due to his ill-health that he could not participate and made representation for postponing the date of proceedings. The petitioner had remained in the ICU as well. The disciplinary authority was required to record reasons separately as held by

the Constitution Bench in ***Tulsi Patel's*** case. No material has been placed before this Court to show that before the issuance of impugned order the reasons were separately recorded. The reasons as assigned in the order of not holding the inquiry being impracticable are based on the *ipse dixit* of the disciplinary authority.

Accordingly the writ petition is allowed. Impugned orders Annexures P-18 and P-21 dated 30.4.2001 and 20.8.2001 respectively are quashed and set aside. The penalty of reduction in rank by one stage imposed upon the petitioner is set aside and the petitioner is held entitled to all the consequential benefits.

(Rajiv Sharma), Judge

14.6.2007
Awasthi